STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 23, 2003
v	No. 242142 Oakland Circuit Court
RANDY LAMONT BAUGH, Defendant-Appellant.	LC No. 99-165781-FC

Before: Gage, P.J., and White and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for second-degree murder, MCL 750.317. The trial court sentenced defendant to twenty to sixty years' imprisonment. We affirm.

This case arises out of the shooting death of the victim, Jack Marceau, during a drug transaction in September 1989. Apparently, Marceau drove his car to the Lakeside Projects area in Pontiac and inquired where he could buy crack cocaine. According to witness testimony, defendant approached the victim's car, a struggle ensued, and defendant shot the victim.

Before trial in this case, the trial court held a hearing regarding the availability of witness Nathaniel Franklin. In December 1989, at the request of police, Franklin had given a statement regarding the shooting of Marceau. Franklin had also testified before a grand jury and at defendant's preliminary examination, although he indicated that he did not want to be there or answer questions. At trial, however, Franklin refused to testify, even under court order. The prosecution moved for the admission of Franklin's preliminary examination testimony into evidence. Defense counsel objected on the ground that he had not fully developed Franklin's testimony through cross-examination because the charge against defendant had been amended since the time of the preliminary examination. However, the trial court found Franklin unavailable under MRE 804(a)(2) and allowed the transcript of Franklin's preliminary examination testimony to be read into evidence under MRE 804(b)(1).

Defendant now argues on appeal that he was denied the effective assistance of counsel by trial counsel's failure to move to suppress Franklin's preliminary examination testimony on the ground that his statements were coerced. We disagree.

Because defendant failed to preserve this issue with the proper motion below, we are limited to a review of the existing record. *People v Sabin (On Second Remand)*, 242 Mich App

656, 659; 620 NW2d 19 (2000). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001), citing *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). A defendant must further demonstrate a reasonable probability that but for counsel's errors, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair or unreliable. *Rodgers*, *supra*, citing *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996). Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

During Franklin's preliminary examination testimony, when asked whether Franklin gave a statement to the police he responded, "What happened was, the officers came in and they asked me – they said to me that this person [the victim] is a friend of the Chief at that time and that we gots to find out who did this at no matter what cost. So, do you know and if you do, tell us or else." Defendant claims that this response demonstrates that the police threatened Franklin into falsely implicating defendant, and thus, defense counsel should have moved to suppress Franklin's testimony.

The admissibility of evidence is a matter of discretion for the trial court. MRE 104; *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). If a witness is coerced to testify or change his testimony by police or prosecutor intimidation, that testimony amounts to a denial of defendant's due process, and is thus inadmissible. *People v Hill*, 257 Mich App 126, 135; 667 NW2d 78 (2003); *People v Stacy*, 193 Mich App 19, 25; 484 NW2d 675 (1992).

Here, the record fails to demonstrate that Franklin's statement to the police and subsequent testimony were the result of police coercion. At the time Franklin gave his statement to the police, he had been arrested a number of times for various offenses. During his testimony, he acknowledged that he was ambivalent toward the prospect of going to prison and, in fact, he viewed prison as "summer camp." However, he also insisted that he did not lie when he said that defendant committed the instant shooting. The record demonstrates that Franklin's testimony was fully developed through cross-examination to show his motives and biases, including his relationship with defendant, the number of outstanding charges against him, and the fact that he knew Marceau was a friend of the police chief.[1] We find no indication that the police coerced Franklin into implicating defendant. Accordingly, a motion to suppress would have been without merit. Counsel is not required to make meritless motions. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002). Therefore, defendant was not denied the effective assistance of counsel by trial counsel's failure to challenge the admission of Franklin's preliminary examination testimony on the ground that the statements were coerced.

[1] We note that once admitted, defense counsel even used Franklin's testimony to defendant's advantage by arguing that Franklin was actually guilty of shooting Marceau. While the jury rejected this argument, a failed trial strategy does not mean a successful ineffective assistance of counsel claim. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Defendant also contends on appeal that the trial court violated defendant's right to due process by allowing members of the jury to submit questions to the witnesses at trial. Because defendant failed to preserve this issue for appeal with the proper objection at trial, our review is limited to plain error. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, defendant must demonstrate a plain error that effected his substantial rights. *Id*. Reversal is warranted only if defendant is actually innocent or "the error seriously affected the fairness, integrity or public reputation of judicial proceedings." *Carines*, *supra* at 763.

In *People v Heard*, 388 Mich 182, 187-188; 200 NW2d 73 (1972), our Supreme Court stated that "the practice of permitting questions to witnesses propounded by jurors should rest in the sound discretion of the trial court." See also *People v Stout*, 116 Mich App 726, 732-733; 323 NW2d 532 (1982). Defendant does not necessarily claim that the trial court abused its discretion in the instant case, but instead claims that the practice of allowing jurors to propound questions improperly allows jurors to seeks out facts and deliberate before the conclusion of trial. Defendant supports his claim with decisions of other state courts finding that the practice interferes with the adversary system and the neutrality of the jury, prejudicing the defendant at trial. See *State v Costello*, 646 NW2d 204, 214 (Minn, 2002); *State v Gilden*, 759 NE2d 468 (Ohio App, 2001), abrogated by *State v Fisher*, 99 Ohio St3d 127; 739 NE2d 468 (Ohio App, 2003). However, we are constrained by the rule of stare decisis to follow the decisions of our Supreme Court. *People v Hall*, 249 Mich App 262, 270; 643 NW2d 253 (2002). We find no basis in the present case to depart from the rule that the questioning of witnesses by jurors is within the sound discretion of the trial court. *Heard*, *supra*; *Stout*, *supra*.

Furthermore, defendant has failed to demonstrate that a plain error occurred in this case. The questions were submitted by jurors in writing to the judge, and were reviewed for admissibility by the judge and counsel out of the presence of the jury and off the record before being presented to the witness. The record demonstrates that one question was rejected as hearsay. Defendant has failed to demonstrate prejudice by any of the juror's questions. See *People v Vertin*, 56 Mich App 669, 680-683; 224 NW2d 705 (1974). Thus, we find no error requiring reversal.

Affirmed.

/s/ Hilda R. Gage
/s/ Helene N. White
/s/ Jessica R. Cooper